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No. 90-143

In The

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT,
JOHN F. DIGIOVANNI,

Petitioners,

v.

BRIAN K. DOEHR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE CONNECTICUT BANKERS ASSOCIATION AND THE SAVINGS BANKS' ASSOCIATION OF CONNECTICUT AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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The Connecticut Bankers Association and the Savings Banks' Association of Connecticut respectfully move for leave to file the accompanying brief as amici curiae in this case. The consent of the Petitioners, the State of Connecticut and John F. DiGiovanni, has been filed with this motion. The Respondent, Brian K. Doehr, has refused to consent to the filing of the brief.

INTEREST OF THE AMICI CURIAE

Almost all Connecticut banks are members of either the Connecticut Bankers Association or the Savings Banks' Association of Connecticut. The Connecticut Bankers Association, formed in 1899, is comprised of 52 commercial banks, trust companies and other banking institutions in Connecticut. The Savings Banks' Association of Connecticut, formed in 1902, is comprised of 64 savings banks. The purpose of both associations is to contribute to a sound banking system in the State of Connecticut and to promote the general welfare and interests of their member banks. [1]

Due primarily to the economic downturn in Connecticut, particularly in the real estate market, the member banks of the Connecticut Bankers Association and the Savings Banks' Association of Connecticut have initiated and will continue to initiate litigation to collect hundreds of millions of dollars of loans in default. Accordingly, prejudgment security is important to and is frequently sought by Connecticut banks. While prejudgment security has always been important in the collection of unsecured loans, it now also is significant with respect to both commercial and residential real estate loans, because the decline in real estate values in Connecticut has caused loans which were fully secured when made to now be

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[1] A list of the member banks of the amici is listed at pp. 1A-4A of the Appendix ("App.") of Amici Curiae attached hereto.

undersecured. Prejudgment security is also significant today because the economic downturn in Connecticut has caused debtors to go to greater lengths than usual to dispute, attempt to avoid, or delay payment of their debts.

Banks' and other creditors' most efficient, effective and expeditious form of prejudgment security has been *ex parte* real estate attachments obtained pursuant to Conn. Gen. Stat. § 52-278e(a)(1), the statute invalidated by the Second Circuit in this case. Accordingly, the Second Circuit's opinion "has the potential to create chaos within the State's legal and business communities." *Soden v. Johnson*, No. CV 83-0067730-S, slip. op. at 3 (Stamford-Norwalk Superior Court, March 26, 1990) (reprinted in Appendix, *see* p. 6A). The amici will assist this Court by describing how the Second Circuit's decision will adversely impact: creditors' ability to collect judgments; the timely and efficient resolution of debtor/creditor disputes; and the cost and availability of loans in Connecticut. The amici will also address conflicts between the Second Circuit's decision and this Court's due process decisions as well as the inconsistent analytical approaches utilized by lower courts in the prejudgment remedy due process area. The State of Connecticut and John F. DiGiovanni have focused their petition on other issues.

For all the foregoing reasons, the Connecticut Bankers Association and the Savings Banks' Association of Connecticut respectfully move for leave to file the accompanying brief as amici curiae.

Respectfully submitted,

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INTEREST OF THE AMICI CURIAE

The interest of the Connecticut Bankers Association and the Savings Banks' Association of Connecticut in this case is set forth in the accompanying Motion For Leave To File a Brief as Amici Curiae.

SUMMARY OF ARGUMENT

For over three hundred years Connecticut has allowed attachments to be made without prior notice or hearing. The current Connecticut prejudgment remedy statutes provide significant procedural and substantive protections against wrongful attachment. Connecticut's *ex parte* real estate attachment statute, Conn. Gen. Stat. § 52-278e(a)(1), allows *ex parte* attachments of real estate only if a judge finds probable cause based on a factual affidavit. Connecticut's prejudgment remedy statutes provide for an expeditious post-attachment hearing at the defendant's request, allow the defendant at anytime to substitute a bond or other property for the liened property, require that a defendant be given notice of these rights, and provide for immediate appellate rights. Under Connecticut law, the defendant also has a double damages cause of action for wrongful attachment.

Nevertheless, the Second Circuit, stating that attachment is an "extraordinary . . . remedy," held § 52-278e(a)(1) unconstitutional because it does not provide for prior notice and hearing. The Second Circuit's decision will substantially impair creditors' ability to recover judgments, timely and efficient resolution of debtor/creditor disputes, and the cost and availability of loans in Connecticut. Additionally, the decision is contrary to this Court's due process decisions, because the Connecticut prejudgment remedy statutes appropriately balance the rights of debtors and creditors. Finally, due to substantial inconsistencies in lower court decisions, this Court should accept certiorari to clarify the analytical approach to be used in prejudgment remedy due process cases.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION WILL SUBSTANTIALLY IMPAIR CREDITORS' ABILITY TO OBTAIN PREJUDGMENT SECURITY, THEREBY ADVERSELY AFFECTING TIMELY AND EFFICIENT RESOLUTION OF DEBTOR/CREDITOR DISPUTES AND THE COST AND AVAILABILITY OF LOANS IN CONNECTICUT.

As set forth more fully in the Motion for Leave to File Brief of the Amici Curiae, banks and other creditors have a substantial need to obtain prejudgment security. For many reasons, real estate attachments are the prejudgment security most sought by banks and other creditors in Connecticut. Real estate ownership is a matter of public record in Connecticut and, therefore, real estate owned by a defendant can expeditiously be located. Since a real estate attachment is accomplished by recording a certificate on land records, there is no cost (such as storage) to maintain the attachment during the litigation. The value of real estate, as opposed to personal property, typically does not substantially decline during the pendency of litigation. Also, real estate attachments facilitate resolution of debtor/creditor disputes, by insuring that a debtor cannot avoid a debt by disposing of assets.

Connecticut has authorized prejudgment remedies without prior hearing and notice for over three hundred years. 1 E. Stephenson, *Connecticut Civil Procedure*, § 38(e), at 148 (1970); P. Shuchman, *Prejudgment Attachments in Three Courts of Two States*, 27 Buff. L. Rev. 459, 461 (1978); (hereinafter "Shuchman"); Code of Connecticut *8 (1650); Conn. Gen. Stat. (Rev. 1702), p. 4; Conn. Gen. Stat. Tit. 19, ch. 2, § 3 (1875); *see Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 611-614 (1974). *Ex parte* real estate attachments are important because they prevent debtors from conveying, encumbering or otherwise alienating real estate prior to attachment. *See id.* at 416 U.S. at 609 ("[t]he danger of destruction or alienation cannot be guarded against if notice and a hearing before seizure are supplied. The notice itself may furnish a warning to the

debtor acting in bad faith."); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 610 (1975) (Powell, J., concurring) ("[g]arnishment and attachment remedies afford the judgment creditor a means of assuring, under appropriate circumstances, that the debtor will not remove from the jurisdiction, encumber or otherwise dispose of certain assets then available to satisfy the creditor's claim."); R. Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 Virginia L. Rev. 807, 847 (1975) (hereinafter "Scott"). *Ex parte* attachments are especially important now because of the current economic downturn in Connecticut, which has caused secured real estate loans to become undersecured, and which has resulted in debtors going to greater lengths than usual to avoid or delay payment of legitimate debts.

Inability to obtain *ex parte* prejudgment real estate attachments will increase the likelihood that creditors will be unable to obtain prejudgment security and satisfaction of judgments. As a result of increased write-offs of uncollectible loans, the cost of credit in Connecticut likely will increase and Connecticut lenders will be forced to require added safeguards, such as additional collateral or personal guarantees. *See, e.g.*, Scott, *supra*, at 810, 836-67. It is likely that these measures will result in decreased lending activity, which would be particularly harmful now, when economic activity and lending in Connecticut is already declining.

The Second Circuit did not consider the harmful "societal costs" of its decision, as it should have. *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976). Nor did it consider the probably minimal value of the additional safeguard of a prior hearing. *Zinermon v. Burch*, __U.S.__, 110 S.Ct. 975, 984 (1990). One 1978 statistical study of Connecticut's prejudgment remedy statutes concluded with respect to preattachment hearings that defendants infrequently appeared to contest attachments, and even when defendants did appear, their appearance had "little or no effect." Shuchman, *supra*, at 484; *see* Scott, *supra*, at 843, 848 (prior hearings are of minimal value).

The Second Circuit's opinion is already adversely affecting Connecticut's creditors and courts. Even though the Connecticut Supreme Court has upheld the constitutionality of § 52-278e(a)(1), *Kukanskis v. Griffith*, 180 Conn. 501, 430 A.2d 21 (1980); *Fermont Div., Dynamics Corp. of America v. Smith*, 178 Conn. 393, 423 A.2d 80 (1979), Connecticut courts currently are not entertaining *ex parte* prejudgment real estate attachments absent exigent circumstances. As a result, hearings must be held prior to any prejudgment real estate attachments issuing, and in some state courts hearings are being delayed for months.[2] The time period between the filing of applications and scheduled hearings can only be expected to increase as the backlog in the state courts continues to grow. As a result, debtors will now have even greater opportunities to transfer or encumber their real estate prior to prejudgment remedy hearings.[3]

For all of the foregoing reasons, this Court should accept certiorari and reverse the Second Circuit's decision.

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[2] Accordingly, the substantial increase in the number of prejudgment remedy hearings and the accompanying backlog in state courts have already increased the state's "administrative burden" and resulted in other adverse "societal costs" as a result of the Second Circuit's decision. *Mathews v. Eldridge*, *supra*, 424 U.S. at 347.

[3] Section 52-278e(a)(1) *ex parte* prejudgment remedy applications are no longer being utilized by attorneys or accepted by Connecticut courts, because of the fear of retaliatory federal civil rights actions by debtors. Although the Second Circuit's decision is not binding on Connecticut state courts, *see, e.g., United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Circ. 1970) *cert. denied*, 402 U.S. 983 (1971); *People v. Brisbon*, 129 Ill. 2d 200, 544 N.E. 2d 297 (1986), *cert. denied*, __U.S.__, 110 S.Ct. 1796 (1990); *Soden v. Johnson*, No. CV 83-0067730-S, slip. op. at 3, (Stamford-Norwalk Sup. Ct., March 26, 1990) (App. at 6A); *Chase Manhattan Bank, N.A. v. Shea*, slip. op. at 1, n.1, No. CV 89-0102197-S (Stamford-Norwalk Sup. Ct., May 18, 1990) (reprinted in Appendix, *see* p. 10A), in effect, it has overruled the Connecticut Supreme Court's decisions in *Fermont* and *Kukanskis* upholding § 52-278e(a)(1). Since this places the Second Circuit in a role that the Constitution confers on this Court alone, this Court should accept certiorari.

II. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DUE PROCESS CASES.

A. The Second Circuit Erred In Holding That Only Under Extraordinary Circumstances May A State Allow Attachment Of Real Estate Without Prior Notice And A Hearing.

The Second Circuit stated that this Court's decisions require prior notice and a hearing absent "extraordinary circumstances," which "must be truly unusual", such as the need 'to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, [or] to protect the public from misbranded drugs and contaminated food.'" *Pinsky v. Duncan*, 898 F.2d 852, 854, 855 (2d Cir. 1990)(quoting *Fuentes v. Shevin*, 407 U.S. 67, 90-92 (1972)). This standard is contrary to numerous decisions of this Court approving property deprivations without notice and hearing and absent such "extraordinary circumstances". *See, e.g., Zinermon v. Burch*, __U.S.__, 110 S.Ct. 975, 984 (1990); *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 19 (1978) ("where the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures . . . are sufficiently reliable to minimize the risk of erroneous determination," a prior hearing may not be required); *Ingraham v. Wright*, 430 U.S. 651, 682 (1977) (hearing not required before corporal punishment of junior high school students); *Mitchell v. W. T. Grant Co., supra*, 416 U.S. at 619-620 (hearing not required before issuance of writ to sequester debtor's property); *Mathews v. Eldridge, supra*, 424 U.S. 319 (prior hearing unnecessary to terminate social security payments); *Barry v. Barchi*, 443 U.S. 55 (1979) (hearing not necessary prior to suspension of horsetrainer's license).

In *Mitchell*, this Court held that Louisiana's sequestration statutes comported with due process, even though they authorized complete deprivation of personal property without prior notice or

hearing, because: a sequestration order could only be issued by a judge based on an affidavit alleging specific facts; the debtor had an opportunity for an immediate hearing to seek dissolution of the order; the debtor could regain possession of the property by posting a bond; and the debtor had a damages remedy for wrongful sequestration. *Mitchell v. W. T. Grant Co., supra*, 416 U.S. at 607-619; *North Georgia Finishing, Inc. v. Di-Chem, Inc., supra*, 419 U.S. at 606-07; *see Jonnet v. Dollar Sav. Bank of City of New York*, 530 F.2d 1123, 1127 (3d Cir. 1976).

This Court in *Mitchell* did not require "a national war effort" or similar extraordinary circumstances to hold that a predeprivation hearing was not constitutionally required. The *Mitchell* court made clear that with respect to prejudgment remedies prior notice and hearing typically were not required:

> The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.' *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931). . . .
>
> 'It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.' (quoting *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599 (1950)).
>
> More precisely in point, the Court had unanimously approved prejudgment attachment liens effected by creditors, without notice, hearing, or judicial order, saying that 'nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit.' (quoting *Coffin Brothers & Co. v. Bennett*, 277 U.S. 29, 31 (1928)).

Mitchell v. W. T. Grant Co., supra, 416 U.S. at 611-613; *see North Georgia Finishing, Inc. v. Di-Chem, Inc., supra*, 419 U.S. at 606 (noting that only an "early hearing" was required in connection with a prejudgment garnishment.); *Id.* at 611 (Powell, J., concurring) ("Pregarnishment notice and a prior hearing have not been constitutionally mandated in the past . . . Such restrictions, antithetical to the very purpose of the remedy, would leave little efficacy to the garnishment and attachment laws of the 50 States.")(footnote omitted.); *Johnson v. American Credit Co. of Georgia*, 581 F.2d 526, 534 n. 16 (5th Cir. 1978); *McCahey v. L. P. Investors*, 774 F.2d 543, 548, (2d Cir. 1985) ("[w]hile some ambiguity exists, it is generally believed that prejudgment *ex parte* attachments are constitutional if issued by a neutral judicial officer on the basis of factual representations regarding the merit of the plaintiff's claim and immediately followed by notice to the defendant and by an opportunity to contest the seizure."); Note, *The Constitutionality of Real Estate Attachments*, 37 Washington & Lee L. Rev. 701, 710 (1980) (*Mitchell* and *North Georgia Finishing, Inc.* "dispens[ed] with the requirement of a prior hearing when the attachment statute provides for a prompt post-seizure hearing.")

The Connecticut statute in this case, like the Louisiana statute in *Mitchell*, provides for issuance of the order of attachment only by a judge based on a fact-specific affidavit, provides the debtor with the right to an immediate hearing to seek dissolution, and provides the debtor with a right to substitute a bond for the attachment. The Connecticut prejudgment remedy statutes also require that notice of these rights be served on the defendant, and provide for immediate appellate rights. Additionally, under Connecticut law, the debtor has a double damages remedy for a wrongful attachment. *See Pinsky v. Duncan, supra*, 898 F.2d at 860-61 (Mahoney, J., concurring). For the reasons set forth above, § 52-278e(a)(1) does not violate the due process clause.

B. Real Estate Attachment Pursuant To § 52-278e(a)(1) Is Not A Substantial Deprivation Of Property Requiring Prior Notice And A Hearing.

The degree and the possible length of wrongful deprivation are relevant in determining compliance with the due process clause. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982); *Memphis Light, Gas & Water Division v. Craft, supra*, 436 U.S. at 19; *Mathews v. Eldridge, supra*, 424 U.S. at 341. Although this Court has never held that a non-possessory attachment constitutes a substantial deprivation, the Second Circuit decided that a real estate attachment constituted a substantial deprivation because it could affect a landowner's ability to encumber or dispose of the property.

The Second Circuit failed to consider that a real estate attachment in no way interferes with the defendant's use or possession of the property. Unlike with other property, a defendant's "'livelihood [is not] threatened by the deprivation of the right to freely transfer the realty.'" *Pinsky v. Duncan*, 716 F. Supp. 58, 60 (D. Conn. 1989) (quoting *Black Watch Farms, Inc. v. Dick*, 323 F. Supp. 100, 102 (D. Conn. 1971); *Williams v. Bartlett*, 189 Conn. 471, 479, 457 A.2d 290, 294, *appeal dismissed*, 464 U.S. 801 (1983). The court also did not consider that under the Connecticut prejudgment remedy statutes, the defendant has an unqualified right to offer a bond or other property in lieu of the property which has been attached. Conn. Gen. Stat. § 52-304.

The Second Circuit also failed to consider the potential length of the deprivation. Nowhere in its legal analysis does the court acknowledge that a defendant may immediately move to dissolve or modify the attachment, and that the trial court must then "proceed to hear and determine such motion expeditiously." Conn. Gen. Stat. § 52-278e(c).

For these reasons, an *ex-parte* real estate attachment pursuant to § 52-278e(a)(1) does not constitute a substantial deprivation of property requiring prior notice and a hearing.[4]

C. The Second Circuit Erroneously Determined That § 52-278e(a)(1) Poses A High Risk Of An Erroneous Deprivation.

The Second Circuit concluded that the risk of a wrongful attachment was considerable because § 52-278e(a)(1) is not limited to simple debtor/creditor disputes. *Pinsky v. Duncan, supra*, 898 F.2d at 856. In making this determination, the Court focused on the facts of the instant case, which involved an alleged assault and battery.

The Second Circuit erred by focusing on the specific facts of the instant case. Even though "credibility and veracity may be a factor . . . in some cases . . . procedural due process rules are shaped by the risk of error inherent in the truth-finding process applied to the generality of cases, not the rare exceptions." *Mathews v. Eldridge, supra*, 424 U.S. at 344. The Connecticut prejudgment remedy statutes in most instances are used by lenders litigating to collect loans in default. As the Second Circuit acknowledged in *Pinsky v. Duncan, supra*, 898 F.2d at 856, and as this Court has recognized, the risk of an erroneous deprivation is minimal in actions involving written loan documents. *Mathews v. Eldridge, supra*, 424 U.S. at 345; *Mitchell v. W. T. Grant Co., supra*, 416 U.S. at 609, 617, 618. Accordingly, even under the Second Circuit's analysis, in

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[4] The Second Circuit failed to consider that the respondent in this case never moved in state court to dissolve or modify the attachment. The respondent's action demonstrates that the deprivation caused by the real estate attachment in this case was slight. *Mitchell v. W. T. Grant Co., supra*, 416 U.S. at 610.

most cases, § 52-278e(a)(1) does not create a substantial risk of an erroneous deprivation.[5]

The Second Circuit also erred by ignoring the double damages remedy available to a defendant whose property has been wrongfully attached.[6] This is contrary to this Court's decision in *Mitchell v. W. T. Grant Co., supra*, 416 U.S. at 610, that a potential damages award minimizes the risk of an erroneous deprivation.

> [P]rior hearings might well be dispensed with in many circumstances in which the state's conduct, if not adequately justified, would constitute a common-law tort. This would leave the injured plaintiff in precisely the same posture as a common-law plaintiff, and this procedural consequence would be quite harmonious with the substantive view that the fourteenth amendment encompasses the same liberties as those protected by the common law.

Ingraham v. Wright, supra, 430 U.S. at 679 n.47 (1977) (quoting Monaghan, *Of "Liberty" and "Property"*, 62 Cornell L. Rev. 405, 431 (1977)(footnote omitted)).

> [W]hen only an invasion of a property interest is involved, there is a greater likelihood that a damages award will make a person completely whole than when an invasion of the individual's interest in freedom from bodily restraint and punishment has occurred. In the property context, therefore, frequently a post-deprivation state remedy may be all the process that the Fourteenth Amendment requires.

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[5] The Second Circuit invalidated § 52-278e(a)(1) on its face. If the court was concerned about the specific application of § 52-278e(a)(1) in this case or its specific application outside of debtor/creditor disputes, it should not have invalidated the statute on its face.

[6] Although Judge Pratt did discuss this damages remedy in the portion of his decision which was not joined by the other panel members, in which he decided that a bond was constitutionally required, *Id.* at 857, the damages remedy was not discussed in Section B of Judge Pratt's decision, addressing prior notice and hearing.

Id. at 701 (Stevens, J., dissenting on other grounds)

The Second Circuit erred in deciding that the risk of an erroneous deprivation of property under § 52-278e(a)(1) was substantial.

D. The Second Circuit Ignored The State's Interest In Facilitating The Collection Of Debts In Order To Support The Flow Of Credit.

The Second Circuit decided that the state's interest in postponing the hearing until after attachment was, in the absence of unusual circumstances, "practically nil." *Pinsky v. Duncan, supra*, 898 F.2d at 856. This decision ignores *Mitchell*, in which this Court recognized that the state had an interest in facilitating debt collection by preventing a defendant from defeating a creditor's lien by transferring property. *Mitchell v. W. T. Grant Co., supra*, 416 U.S. at 608, 609; *North Georgia Finishing, Inc. vs. Di-chem, Inc., supra*, 419 U.S. at 610 (Powell, J., concurring) ("The State's legitimate interest in facilitating creditor recovery through the provisions of garnishment remedies has never been seriously questioned."); *see McCahey v. L. P. Investors, supra*, 774 F. 2d at 549 (the state has legitimate interests in "providing inexpensive and rapid methods of collecting judgments . . ."); *see Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1329 (3d Cir. 1982) ("[i]f the power of the courts to determine the rights of the parties to real property could be defeated by its transfer, *pendente lite*, to a purchaser without notice, additional litigation would be spawned and the public's confidence in the judicial process could be undermined.")

III. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO CLARIFY THE LEGAL ANALYSIS TO BE APPLIED BY THE LOWER COURTS.

As set forth above the amici believe that under this Court's prior decisions, § 52-278e(a)(1) does not violate the due process clause. Nevertheless, relying on this Court's due process prejudgment remedy decisions, *Sniadach v. Family Finance Corp.*,

395 U.S. 337 (1969), *Fuentes*, *Mitchell* and *North Georgia Finishing, Inc.*, lower courts have rendered inconsistent decisions and utilized inconsistent analytical approaches in this area. This is evidenced by the opinions of the three Second Circuit judges in this case, *see Pinsky v. Duncan, supra*, 898 F.2d at 859 (Mahoney, J., concurring) (court's conclusion "is not entirely free from doubt."), as well as by the opinions of the Connecticut Supreme Court in *Fermont Division, Dynamics Corp. of America, Inc. v. Smith*, and *Kukanskis v. Griffith*, and four judges of the United States District Court for the District of Connecticut, *Shaumyan v. O'Neill*, 716 F. Supp. 65 (D. Conn. 1989); *Pinsky v. Duncan, supra*, 716 F. Supp. 58; *Read v. Jackson*, Civ. No. B-85-85 1988 Westlaw 163017 (D. Conn. Feb. 18, 1988); *Armstrong Cumming Architects v. Gruen*, No. B-88-680 (EBB) slip. op. (D. Conn. July 17, 1989), all holding that § 52-278e(a)(1) does not violate the due process clause. Other courts and commentators also have noted the inconsistencies, *e.g.*, *Jonnet v. Dollar Sav. Bank, supra*, 530 F.2d at 1126 (these "opinions have produced not only varying results, but different analytical approaches to due process problems."); Note, *The Constitutionality of Real Estate Attachments*, 37 Washington and Lee L. Rev. 701, 705 & n.26 (1980); Scott, *supra*, at 808, 809 & n.5; Note, *Constitutionality of Mechanic's Liens Statutes*, 34 Washington & Lee L. Rev. 1067, 1086 (1977), as have members of this Court, *see, e.g., North Georgia Finishing, Inc. v. Di-Chem, Inc., supra*, 419 U.S. at 614 (Blackmun, J., dissenting) (prejudgment remedy statutes have been "left in questionable constitutional status, with little or no applicable standard by which to measure and determine their validity under the Fourteenth Amendment.")

There also is uncertainty as to whether the totality of the circumstances due process approach, *e.g. Zinermon v. Burch, supra*, __U.S.__, 110 S.Ct. at 984, should be applied to prejudgment remedy statutes, or whether a checklist approach based on the characteristics of the statutes addressed in *Mitchell v. W. T. Grant Co.* and *North Georgia Finishing, Inc. v. Di-Chem, Inc.* should be utilized. *E.g.* Note, *Creditors' Prejudgment Remedies and Due Process of Law - Connecticut's Summary Procedure Upheld: Fermont Division, Dynamics Corp. of America v. Smith*, 12 Conn. L. Rev. 174, 187-190 (1979); *Shaumyan v. O'Neill, supra*, 716 F. Supp. at 72, 73. Accordingly, this Court should clarify that the totality of the circumstances approach should be utilized and, for the reasons set forth above, reverse the Second Circuit's decision.

CONCLUSION

For all of the foregoing reasons, the Connecticut Bankers Association and the Savings Banks' Association of Connecticut respectfully submit that the petitioners' Petition should be granted and a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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August 1990

APPENDIX

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CONNECTICUT BANKERS ASSOCIATION MEMBERS

American National Bank, Hamden
Bank of Boston Connecticut, Waterbury
Bank of Darien
Bank of East Hartford
Bank of Mystic
Bank of Southeastern Connecticut, Waterford
Bank of Southington
Bank of South Windsor
Bank of Stamford
Bank of Waterbury
BayBank Connecticut, N. A., Hartford
Brookfield Bank
Canaan National Bank
Candlewood Bank & Trust, New Fairfield
Citizens National Bank of Putnam
CityTrust, Bridgeport
Connecticut Bank & Trust, Hartford
Connecticut National Bank, Hartford
Connecticut Valley Bank, Cromwell
Equity Bank, Wethersfield
First Bank of West Hartford
First Central Bank, Hartford
First City Bank
First National Bank-CT, Hartford
First National Bank of Litchfield
First National Bank of Suffield
Fleet Bank of Connecticut
Founders Bank, New Haven
Glastonbury Bank & Trust
Greenwood Bank of Bethel
Housatonic Bank & Trust, Ansonia
Jewett City Trust Company
Lafayette Bank & Trust, Bridgeport

Landmark Bank, Hartford
Manchester State Bank
Merchants Bank & Trust, Norwalk
National Iron Bank, Salisbury
New Canaan Bank & Trust
New England Bank & Trust, Windsor
New Milford Bank & Trust
Norwalk Bank
Putnam Trust Company, Greenwich
Salisbury Bank & Trust, Lakeville
Saybrook Bank & Trust, Old Saybrook
Sentinel Bank, Hartford
Shoreline Bank & Trust, Madison
Summit National Bank, Torrington
Union Trust Company, Stamford
UST Bank Connecticut, Bridgeport
Vernon Bank
Village Bank & Trust, Ridgefield
Wilton Bank

SAVINGS BANKS' ASSOCIATION OF CONNECTICUT MEMBERS

Advest Bank, Hartford
American Bank of Connecticut, Waterbury
American Savings Bank, New Britain
Bank Mart, Bridgeport
Bank of Hartford
Branford Savings Bank
Bristol Savings Bank
Brooklyn Savings Bank, Danielson
Burritt InterFinancial Bancorporation, New Britain
Centerbank, Waterbury
Central Bank, Meriden
Chelsea Groton Savings Bank, Norwich
City Savings Bank of Meriden
Collinsville Savings Society
Colony Savings Bank, Wallingford
Community Savings Bank, Bristol
Connecticut Savings Bank, New Haven
Derby Savings Bank
Dime Savings Bank of Norwich
Dime Savings Bank of Wallingford
Essex Savings Bank
Fairfield County Savings Bank, Norwalk
Farmers & Mechanics Bank, Middletown
Farmington Savings Bank
Financial Federal Savings Bank, Hartford
First Constitution Bank, New Haven
First County Bank, Stamford
Gateway Bank, South Norwalk
Great Country Bank, Ansonia
Guilford Savings Bank
Jewett City Savings Bank
Liberty Bank for Savings, Middletown
Litchfield Bancorp

Mechanics Savings Bank, Hartford
Mechanics & Farmers Savings Bank, FSB, Bridgeport
MidConn Bank, Kensington
Milford Bank
Moodus Savings Bank
Naugatuck Savings Bank
New Haven Savings Bank
New Milford Savings Bank
New England Savings Bank, New London
Newtown Savings Bank
Northwest Bank for Savings, Winsted
Norwalk Savings Society
Norwich Savings Society
People's Bank, Bridgeport
Peoples Savings Bank, New Britain
Putnam Savings Bank
Ridgefield Bank
Savings Bank of Danbury
Savings Bank of Manchester
Savings Bank of Rockville
Society for Savings, Hartford
Southington Savings Bank
Stafford Savings Bank, Stafford Springs
State Bank for Savings, Southington
Suffield Bank
Thomaston Savings Bank
Tolland Bank
Torrington Savings Bank
Union Savings Bank of Danbury
Willimantic Savings Institute
Winsted Savings Bank

D.N. CV83 0067730S	)	SUPERIOR COURT
JOHN V. SODEN	)	
V.	)	
ROBERT E. JOHNSON, ET AL.	)	JUDICIAL DISTRICT
. . . . .	)	OF STAMFORD/
D.N. CV89 0105334S	)	NORWALK
GREENWICH TILE	)	AT STAMFORD
V.	)	
MALLOY	)	MARCH 26, 1990
. . . . .	)	
D.N. CV 89 0103308S	)	
BARNETT BANK	)	
V.	)	
GABOR J. MERTL, ET AL.	)	
. . . . .	)	
D.N. CV89 010533S	)	
GREENWICH TILE	)	
V.	)	
MALLOY DEVELOPMENT	)	
. . . . .	)	
D.N. CV89 0102621S	)	
NEW CANAAN FOREIGN CAR	)	
V.	)	
G. BARRETT MONTGOMERY	)	

MEMORANDUM OF DECISION
RE: MOTION TO DISSOLVE EXISTING
PREJUDGMENT REAL ESTATE ATTACHMENTS

This memorandum of decision addresses issues raised in motions filed by various defendants with this court to dissolve prejudgment attachments issued against their real estate. The attachments had been obtained *ex parte*, pursuant to Conn. Gen. Stat. § 52-278e. Section 52-278e has subsequently and very recently been declared to be unconstitutional on its face by the Second Circuit Court of Appeals. The Second Circuit's opinion, announced in *Pinsky v. Duncan*, No. 89-7521 (2nd Cir. March 9, 1990), found that Connecticut's *ex parte* prejudgment real estate attachment statute was unconstitutional on its face in that it deprived a defendant of his right to a hearing prior to issuance of the attachment in violation of the due process clause of the 14th Amendment to the United States Constitution. Not surprisingly, the *Pinsky* decision has generated a great deal of controversy about the continued validity of existing prejudgment real estate attachments, and has given rise to a flurry of motions to dissolve such attachments. This memorandum will address such motions generally.

At the outset, this court acknowledges that it is bound by the decisional law of our Supreme Court. However, the court also recognizes that the *Pinsky* decision has the potential to create chaos within the state's business and legal communities. Therefore, the issues raised by the *Pinsky* decision in the motions before this court should be addressed.

While decisions of federal courts passing on federal constitutional questions should be afforded due respect by the state courts, the federal courts exercise no appellate court jurisdiction over state courts. *See United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970); *People v. Brisbon*, 129 Ill. 2d 200, 544 N.E. 2d 297, 135 Ill. Dec. 801 (Ill. 1989). Until the United States Supreme Court has spoken, state courts are not

precluded from exercising their own judgments on federal constitutional questions. *United States ex rel. Lawrence v. Woods*, 432 F.2d at 1075, quoting the Supreme Court of Iowa in *Iowa Nat'l. Bank v. Stewart*, 214 Iowa 1229, 232 N.W. 445, 454 (1930).

Our Supreme Court has spoken on the question of the constitutionality of Conn. Gen. Stat. § 52-278e and has determined that the statute meets the due process standards of the state and federal constitutions. *Fermont Division, Dynamics Corp. of America, Inc. v. Smith*, 178 Conn. 393, 397, 423 A.2d 80 (1979). Consequently, at this point in the process of judicial review of § 52-278e, this trial court is bound by the Connecticut Supreme Court's finding of constitutionality in *Fermont*. The opinions of the Supreme Court of Connecticut are binding upon the Superior Court and...until the court's decisions are changed, the Superior Court is bound to follow them. *Montes v. Hartford Hospital*, 26 Conn. Sup. 441, 442-43 (1966). Accordingly, as to the motions before this court which seek to vacate or dissolve existing prejudgment real estate attachments on the grounds of the Second Circuit Court of Appeals ruling in *Pinsky*, the motions are denied under *Fermont*.

However, even if this court were not bound by *Fermont*, and were to follow the *Pinsky* ruling, the question of whether *Pinsky* should be applied retroactively to invalidate all existing real estate attachments obtained through *ex parte* orders would still remain to be determined. In the interest of eliminating the speculation and uncertainty attendant to this issue, the following discussion is provided.

The United States Supreme Court considered the question of nonretroactive application of judicial decisions within a civil context in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L.E. 2d 296, 92 S. Ct 349 (1971). In *Chevron*, the court identified the three factors to be weighed in each case to determine whether a judicial decision should be applied retroactively or prospectively. *Id.* at 106. First, the decision must establish a new principle of law, either by overturning clear past precedent or by deciding an issue of first impression. *Id.* Second, the court must determine whether

retrospective application of the new rule will further or retard its operation in each case. *Id.* at 107. Finally, if retroactive application of the court's decision could produce substantial inequitable results, there is ample basis for avoiding the hardship by a holding of nonretroactivity. *Id.* at 107.

Turning to the issue raised here by retroactive application of the *Pinsky* ruling, namely the continued validity of existing *ex parte* real estate attachments obtained pursuant to § 52-278e, the court concludes the new rule would be applied prospectively only.

A weighing of the merits and demerits of retroactive application of the *Pinsky* rule to existing *ex parte* real estate attachments in Connecticut demonstrates that substantial inequitable results may occur if *Pinsky* is not limited to prospective force. The decision clearly overturns past legal precedents in this state and renders unlawful statutory procedures upon which Connecticut litigants have reasonably relied. Retroactive operation of the decision will not further the operation of the rule. On the contrary, retroactive application of *Pinsky* would create hardship and injustice to creditors who have lawfully obtained attachments to secure their interests. The disruptive effect of summary dissolution of existing real estate attachments would be far-reaching and potentially devastating to an orderly business community. Issues relating to the validity of title to real estate and priority of secured interests would be implicated.

For the foregoing reasons, this court would follow the reasoning of the Supreme Courts of Massachusetts and Rhode Island, as well as the District Court of Massachusetts when, upon invalidating similar prejudgment real estate attachment statutes, those courts expressly held their decisions to have prospective application only. *See Marran v. Gorman*, 359 A.2d 694 (1976); *Bay State Harness Horse Racing and Breeding Ass'n. v. PPG Industries, Inc.*,

365 F. Supp. 1299 (D. Mass. 1973); *McIntyre v. Associates Financial Services Co.*, Mass., 328 N.E. 2d 492 (1975).

/s/
CIOFFI, J.

Decision entered in accordance with the foregoing dated this 26th day of March, 1990.

John Morrow
Chief Clerk

All counsel notified. J. M.

CV 89-0102197 S	:	SUPERIOR COURT
THE CHASE MANHATTAN BANK, N.A.	:	JUDICIAL DISTRICT OF STAMFORD/NORWALK AT STAMFORD
V.		
STEPHANIE W. SHEA	:	MAY 18, 1990

MEMORANDUM OF DECISION

The defendant Stephanie W. Shea has moved pursuant to General Statutes § 52-278e(c) to dissolve a prejudgment remedy consisting of an ex parte attachment of her real estate located in Darien in the amount of $9,000,000, which was granted by this court on August 31, 1989.[1] In addition, the plaintiff seeks an order that the defendant produce and deposit with the clerk of this court her shares of stock in a New York City cooperative apartment.

At various times in the latter part of 1988 and the early months of 1989 the plaintiff, The Chase Manhattan Bank, N.A. ("Chase"), loaned $8,275,000 to Deltrade International, Ltd., also known as Deltrade Delaware ("Deltrade"), in the form of a series of bankers' acceptance drafts, repayment of which was guaranteed by

[1] This decision is unaffected by the March 9, 1990 holding of the Court of Appeals for the Second Circuit in *Pinsky v. Duncan*, that Connecticut General Statues § 52-278e was unconstitutional for the reasons stated in my memorandum of March 27, 1990: (i) the property owner has been afforded a hearing; (ii) I believe the decision is prospective only, not retroactive; and (iii) the decision is not binding on this court in any event. On April 25, 1990, the Court of Appeals amended its prior opinion to state that: "...our declaration of the unconstitutionality of Conn. Gen. Stat. § 52-278(a)(1) shall have prospective effect only, *i.e.*, shall be applicable only to attachments filed after March 9, 1990."

Deltacorp., Inc., a company controlled by the same individuals owning Deltrade. There is no question that the loan was made and that it has not been paid, but both Deltrade and Deltacorp, Inc., are in bankruptcy. The defendant Shea was the president and a director of both Deltrade and Deltacorp, Inc., although the principal officer and chairman of each company was one Antonino Castellett.

Chase has sued Mrs. Shea claiming that she made fraudulent misrepresentations which induced Chase to make the loan in question. Although Mrs. Shea signed all the documents such as the purpose letters and assignments in her capacity as a corporate officer, Chase points to the law of agency and in particular to *Scribner v. O'Brien, Inc.*, 169 Conn. 389, 404, 363 A.2d 160 (1975) ("Where, however, an agent or officer commits or participates in the commission of a tort, whether or not he acts on behalf of his principal or corporation, he is liable to third persons injured thereby.") as authority that a corporate officer who makes fraudulent misrepresentations may be held personally liable for such misrepresentation.[2] See also Restatement (2nd) of Agency Law, S343, 348 (1958).

The loan by Chase was made to finance the purchase of sulphur by Deltrade. The transactions in question in this case were primarily purchases of sulphur from Shell Canada and sale through the Port of Vancouver, British Columbia, to C. Itoh. Chase alleges that it was defrauded by Mrs. Shea in several different ways: (i) that she misrepresented that a merger of Deltrade Bermuda and Deltrade Delaware had taken place; (ii) that in several cases there was no collateral for Chase's loan; (iii) that there was no matching of purchases and sales of sulphur as promised; and (iv) that several

[2] Plaintiff also sues Mrs. Shea for alleged violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), General Statutes § 42-110(a) *et seq.* This act, however, pertains only to unfair practices committed in this state, whereas the claims of fraud in this case are alleged to have occurred in New York. *Whelan Engineering Co. v. Tomar Electronics, Inc.*, 672 F. Supp. 659, 666 (D. Conn. 1987).

sales had been financed by another bank, double-financing in effect. Each of these alleged misrepresentations will be analyzed in further detail, but first, several other matters require discussion.

Both the Supreme Court and the Appellate Court have recently discussed the criteria for the dissolving or vacating of a prejudgment remedy. *New England Land Co., Ltd. v. DeMarkey*, 213 Conn. 612, 620, 569 A.2d 1098 (1990), makes it clear that the trial court's role is "...to determine probable success by weighing probabilities" and that the plaintiff has the burden of demonstrating "...that there is probable cause to sustain the validity of the claim." See also to the same effect *Sweet v. Sumnerebrook Mill Development Corporation*, 21 Conn. App. 191, 192-193, A.2d (1990).

The claim asserted is the tort of fraudulent misrepresentation, the "essential elements" of which were outlined in *Miller v. Appleby*, 185 Conn. 51, 54-55, 438 A.2d 811 (1981), as: "(1) that a false representation was made as a statement of fact; (2) that it was untrue and known to be untrue by the party making it; (3) that it was made to induce the other party to act on it; and (4) that the latter did so act on it to his injury."

This case is actually governed by the law of New York, where the events in question occurred, as pointed out previously in footnote 2, but there does not appear to be any discernible difference between Connecticut and New York law on the subject of fraud. See *Channel Master Corp. v. Aluminum, Ltd. Sales*, 4 N.Y.2d 403, 407, 176 N.Y.S.2d 259, 151 N.E.2d 833 (1958), and also 60 N.Y.Jur.2d, Fraud and Deceit, S11.

Secondly, at the trial Chase will be obliged to present the "clear, precise and unequivocal" proof required to sustain a cause of action in fraud. *Campisano v. Nardi*, 212 Conn. 282, 285, 562 A.2d 1 (1989). In discussing the vacating of a prejudgment remedy in a fraud case *Common Condominium Assns., Inc. v. Common Associates*, 192 Conn. 150, 153, 470 A.2d 699 (1984), indicates

that in evaluating probable cause and whether a plaintiff will prevail, one must have in mind "...the higher standard of proof in fraud..."

One other point should be mentioned at this time. The defendant claims that there are mistakes and inconsistencies in the affidavit of one of Chase's representatives, Peter Galbraith, which was used to procure the ex parte real estate attachment. *Glanz v. Testa*, 200 Conn. 406, 408-409, 511 A.2d 341 (1986), however, provides that a plaintiff may present evidence at a hearing in support of an insufficient initial affidavit. Accord *Banks v. Vito*, 19 Conn. App. 256, 264, 562 A.2d 71 (1989), so the alleged deficiencies in the Galbraith affidavit are not at all crucial factors in my decision.

I have also, of course, taken into account the defendant's invocation of her Fifth Amendment right against self-incrimination which in turn permits an adverse inference to be drawn against the defendant.[3]

Olin Corporation v. Castells, 180 Conn. 49, 53-54, 428 A.2d 319 (1980), holds that such an adverse inference may be drawn, but does not necessarily have to be. This same adverse inference rule applies in New York. *Marine Midland Bank v. Russo Produce, Co.*, 50 N.Y.2d 31, 42, 427 N.Y.S.2d 961, 405 N.E.2d 205 (1980). See generally Heidt, The Conjurer's Circle: The Fifth Amendment Privilege in Civil Cases, 91 Yale L.J. 1062, 1118-1119 (1982). It has been represented that a criminal case or investigation involving Castellett and the defendant is pending in New Jersey. It seems to me that employing the Fifth Amendment privilege where there is an actual existing criminal case is different from asserting the privilege solely to thwart a plaintiff in processing a civil case, and moreover, Chase's investigation of this case did not appear to have been impeded by Mrs. Shea's action.

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[3] "No person...shall be compelled in any criminal case to be a witness against himself..."; see also Connecticut Constitution, Art. First, sec. 8 ("[N]o person shall be compelled to give evidence against himself...")

Turning now to the specific allegations of fraud, the first involves a claim that Mrs. Shea induced the plaintiff to make the loan to Deltrade Delaware on her representation that the assets of a financially viable company, Deltrade Bermuda, had been merged with the Delaware company in early 1988, which was then to be the active trading entity. It is further alleged that no such merger occurred, that Deltrade Delaware had no assets and was a mere shell, and that had Chase been aware of this, it would not have made the loan in question to the Delaware company.

I do not believe that the plaintiff has shown probable cause with respect to this particular allegation of fraud. It remains rather vague as to exactly what Mrs. Shea is claimed to have said with respect to this merger, or even how important it was to Chase in inducing it to make the loan, particularly in the light of the fact that Deltacorp., Inc., the parent of both the Bermuda and Delaware subsidiaries, guaranteed the loan. One Chase witness did not remember any representations by the defendant on this subject and another was not sure of the exact words used. Also, Mrs. Shea at one point told another financial institution, American Express Bank, with which Chase was in contact, that the merger had not in fact occurred, and she also sent to Chase a financial statement which indicated, or at least implied, that no such merger had occurred.

The next claim of fraud involves several transactions in which the sulphur had already been sold to and paid for by C. Itoh before Deltrade received financing by Chase. However, the plaintiff retained a security interest in the proceeds of these sales, so it is not accurate to claim as does the plaintiff that it was thereby deprived of its collateral. Rather, the collateral, instead of consisting of inventory or receivables, became the actual funds paid for the sulphur by C. Itoh to Deltrade. In addition, when drawing down this money Mrs. Shea used different wording which in effect flagged the difference between these transactions.

Another allegation of fraud against the defendant Shea claims that on several occasions there were no matching purchases and sales

of sulphur by Deltrade. It is true that in several instances the sulphur purchases that were being financed by the plaintiff had not been pre-sold, and in one case a purported sale of 6403 metric tons to C. Itoh did not appear on that company's records. On the other hand, the total sales of sulphur by Deltrade and the number of tons financed by Chase were very much in tandem, approximately 50,000 metric tons, and, as the defendant points out, there was no specific reference as such in the loan agreement to a requirement of matching sales. The senior loan officer who gave final approval to the sale had not heard of the phrase mirror or matching sales, and another Chase witness agreed that the purchases of sulphur did not have to be backed formally by sales, but rather that it was the total of purchases and sales that was important.

In short, with respect to allegations of fraud grounded on lack of collateral or matching sales I find that the plaintiff has not sustained its burden of proof.

The plaintiff also complains that with respect to at least two sales of sulphur in late 1988 and in May 1989, American Express Bank had previously loaned money to Deltrade and had a lien on the same collateral as Chase. However, it is not at all clear that Chase was defrauded in this regard, because the plaintiff and Deltrade had previously signed an inter-creditor agreement which provided that in the event there was double-financing or pledging of the same collateral Chase would have a lien superior to that of any other financial institution. It is also arguable that American Express Bank was not financing specific purchases as such, but rather was loaning money to Deltrade on some other basis such as financing inventory.

In conclusion, if the standard of proof in this proceeding had been simply preponderance of the evidence as in the ordinary civil case, then theoretically the requisite probable cause could have been found because of the defendant's invocation of the Fifth Amendment. However, even with the Fifth Amendment inference working against Mrs. Shea, as it surely does, I cannot say that Chase has sustained its burden of showing probable cause based on "...the

higher standard of proof in fraud..." *Common Condominium Assns., Inc. v. Common Associates, supra*, 153.

Accordingly, the defendant's motion to vacate the attachment of her real estate is granted.

So Ordered.
Dated at Stamford, Connecticut this 18 day of May, 1990.

/s/
William Burke Lewis, J.

Decision entered in accordance with the foregoing.

5-18-90
Sean Quigley
Ass't. Clerk

All counsel notified

5-18-90